STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Bandstra, P.J., Cavanagh and Zahra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

Case No. 119500
COA No. 214941
Livingston County
Circuit Court Case No. 97-10185-FC

WILLIAM COLE GRANT,

Defendant/Appellant.
_____/

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

David L. Morse (P33093)
Livingston County Prosecuting Attorney
William J. Vailliencourt, Jr. (P39115)
Assistant Prosecuting Attorney
Attorney for Plaintiff/Appellee
210 S. Highlander Way
Howell, Michigan 48843
(517) 546-1850

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

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DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

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DAVID L. MORSE
Prosecuting Attorney
:10 South Highlander Way
Howell, Michigan 48843

COUNTER-STATEMENT OF JURISDICTION

The People concur with Defendant's Statement of Jurisdiction.

DAVID L. MORSE
Prosecuting Attorney
210 South Highlander Way
Howell, Michigan 48843

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did The Trial Court Properly Hold That Defendant Failed to Demonstrate That a New Trial Was Required Due to Newly Discovered Evidence?

Defendant answers:	No
The People answer:	Yes
The trial court and Court of Appeals answered:	Yes

II. Was Counsel Ineffective for Not Interviewing Witnesses Whose Testimony Would Not Have Benefitted Defendant?

Defendant answers:	Yes
The People answer:	No
The trial court and Court of Appeals answered:	No

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In October, 1995, eight-year-old Lucy Guido[1] was at her grandparents' home in Livingston County.[2] Her aunt's boyfriend, Defendant William Grant, was there and told Lucy to go with him into the woods behind the house.[3] Once alone in the woods, Defendant pulled down Lucy's pants and asked if he could get on top of her.[4] Defendant took his pants off and got on top of Lucy.[5] Defendant reached down and put his penis inside Lucy's vagina.[6] When he pulled it out, Lucy discovered her vagina was bleeding.[7] They then went to the house and Lucy went into the bathroom, where she saw more blood.[8] Defendant told her not to tell anyone about what happened except to say that it was bike accident.[9]

Lucy went to the hospital and was treated by Dr. William Bradfield for a vaginal injury on October 22, 1995.[10] Dr. Bradfield described the injury as similar to someone who had

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[1] 50a.

[2] 59a.

[3] 59a-60a.

[4] 61a.

[5] 61a-62a.

[6] 63a-65a.

[7] 66a.

[8] 66a, 86a.

[9] 67a-86a.

[10] 21a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

delivered a baby and had an episiotomy.[11] Lucy needed to have her anal sphincter muscle sewn back together and then the posterior wall of the vagina sewn back together.[12] This required a total of about twenty stitches.[13] Lucy told Dr. Bradfield that the bleeding was caused by a bicycle accident.[14]

Another time around Thanksgiving of 1996, Defendant and Sam Cain, Sr. came to see Anthony Guido at the Guido apartment to ask for money.[15] Lucy and her younger sister June[16] were cleaning their bedroom.[17] Defendant left Anthony for anywhere from four or five to ten minutes to supposedly use the bathroom.[18] Defendant then came into the bedroom while the girls were in the closet. Defendant then reached inside Lucy's clothes with his hand and touched her vagina.[19] Defendant then unsnapped June's pants, reached inside her clothes and used his fingers to touch June's genital area.[20] Both Lucy and June observed one another

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[11]27a.

[12]27a.

[13]30a.

[14]25a, 87a.

[15]75a, 116a-117a.

[16]June is a grade behind Lucy and is in special education. 111a-112a.

[17]75a.

[18]118a-119a.

[19]76a-77a.

[20]77a-81a, 94a-97a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

being molested.[21]

Afterwards, Lucy told her friend Leah Heater about being molested by Defendant.[22] Despite promising not to tell anyone, Leah told her mom, who then contacted Protective Services.[23] Lucy then told the police about what happened to her.[24]

On December 12, 1996, Dr. Jamie Bond met both Lucy and June.[25] Lucy told Dr. Bond that the person who had molested her told her to tell Dr. Bradford that her injuries were caused by a bike accident.[26] Lucy explained to Dr. Bond the circumstances of her injury as well as being touched inside her pants in her own home.[27]

At trial, Defendant challenged the credibility of both victims, as well as the medical witnesses. Defendant's cross-examination of Lucy revealed that she had only once tried to tell her father about being molested by Defendant and never told him about not liking Defendant.[28] In a statement later contradicted by Amanda Cain,[29] Lucy testified about telling her Aunt Amanda that Defendant "wanted to do it" in the swimming pool but that she said nothing at

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[21] 77a-81a, 98a. Both girls also described another uncharged incident of molestation that occurred in a swimming pool. 68a-69a, 98a-100a.

[22] 71a.

[23] 71a-72a, 104a-109a.

[24] 72a.

[25] 41a.

[26] 44a.

[27] 43a-44a, 48a.

[28] 18b-19b.

[29] 132a, 79b.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

all about the touching that occurred.[30] In response to questioning about the number of times Defendant had molested her, although she was unable to be specific,[31] Lucy described sexual abuse involving a peacock feather,[32] a screwdriver, and a pencil.[33] Other points Defendant scored in his efforts to challenge Lucy's credibility concerned Lucy's testimony that she called out to Defendant from her bedroom at the time of the second incident. Lucy testified that she always did what her younger sister told her[34] and didn't even call out to her dad for help, even though he was in the next room.[35] Only to be later contradicted by the officer in charge, Lucy denied telling police about seeing Defendant french kiss June in the closet.[36]

June's credibility was attacked primarily through accentuation of testimony which the jury might consider as incredible or contradicted by other testimony. For example, June contradicted her father, Sam Cain, Sr., and Lucy, when she testified that Defendant came immediately to her bedroom upon his arrival without stopping to talk to her father.[37] She further denied Lucy's testimony that June had called out for Defendant to come back to the

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[30]20b.

[31]21b-23b.

[32]Amanda Cain testified that there were peacock feathers in her bedroom. 80b. It was in the bedroom that Lucy said Defendant put peacock feathers inside her. 23b.

[33]24b-25b. Although at one point, Lucy confusingly testified that the screwdriver means the same thing as the peacock feather. 23b.

[34]28b.

[35]29b.

[36]30b, 69b.

[37]*Compare* 35b *with* Tony 54b-55b.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

bedroom, instead attributing the statement to Lucy.[38] Again contradicting Lucy, June denied that Defendant kissed her.[39] June further described how she and her sister then went out into the kitchen and sat on Defendant's lap for a while.[40] Finally, June testified that she told her father prior to this incident what Defendant had been doing,[41] and also immediately after Defendant left.[42] Both points were contradicted by Anthony Guido.[43]

During cross examination of Dr. Bradfield, counsel confirmed that the physical injuries suffered by Lucy were entirely consistent with the explanation she originally offered, a bicycle accident.[44] Counsel further highlighted that Lucy appeared less nervous than most seven-year-olds and that she didn't seem to be particularly under stress.[45] Exploring Lucy's claim about the insertion of a screwdriver, counsel pressed Dr. Bradfield regarding the injury such an act might cause. Dr. Bradfield observed that a insertion of a foreign object was more likely to cause a ragged injury than a smooth injury.[46] He further went on that use of a sharp object like a screwdriver would likely cause some scarring, none of which he observed in examining

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[38] 35b-36b.

[39] 36b.

[40] 37b-38b.

[41] 39b-40b.

[42] 41b.

[43] 119a.

[44] 36a-37a, 40a.

[45] 36a.

[46] 39a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

Lucy.[47]

Regarding the claimed bike accident, Defendant brought out testimony from Anthony Guido that both girls rode bicycles at their grandparents.[48] Sam Cain, Sr. testified that Lucy rode a bicycle that was damaged.[49] Three different witnesses related that T.J. said he saw Lucy in a bike accident.[50]

In his closing argument, Defendant also attacked the general credibility of the victims, pointing out the inconsistencies in the description of the incident in the closet, as well as factors that would cast doubt on the veracity of Lucy and June's testimony:

- after being molested both girls came out of their bedroom to be with Defendant and either one or both girls sat on Defendant's lap;[51]
- discrepancies in how many times Lucy was penetrated with a feather, once as she testified, or many times, as she told the police;[52]
- inconsistencies about whether there was a french kiss in the closet;[53]
- inconsistencies about who was present for the incident in the pool and whether

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[47]5b-7b.

[48]58b.

[49]120a-123a.

[50]Sam Cain, Sr. at 125a; Sam Cain, Jr. at 127a; and Amanda Cain at 132a.

[51]Testimony from 78a and 38b argued in closing at 145a.

[52]147a.

[53]148a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

this information was revealed to police;[54]

- the difference in the demeanor of Lucy and June during their various interviews. For example, as noted by defense counsel, while it is normal to be nervous when lying, Lucy was calm while telling Dr. Bradfield about the bike accident, but nervous and agitated during her interviews with police and Dr. Bond;[55]
- Lucy's testimony that she was eight and a half months pregnant and her baby was taken;[56]
- physical evidence that was equally consistent with innocence as it was with guilt;[57]
- Lucy calling Defendant back into a closet when he had been abusing her with screwdrivers, pencils, etc. for over a year;[58]
- Lucy's claim that she lied to Dr. Bradfield about the bike accident because she was afraid that it would happen again, yet called Defendant back into a closet?[59]

Defendant's closing argument finished with a plea to the jury to use common sense in

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[54]148a-147a.

[55]149a.

[56]150a-151a.

[57]152a.

[58]153a.

[59]153a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

assessing the veracity of the claims by Lucy and June.[60]

After considering the testimony, including the critical but intangible factors that can never be replicated in a cold record of Lucy and June's presentation and demeanor, the jury convicted Defendant as charged: one count of First Degree Criminal Sexual Conduct, contrary to MCL 750.520b(1)(a) involving the October 1995 penetration of Lucy (Count 1 of the Information) and two counts of Second Degree Criminal Sexual Conduct (Counts 2 and 3 of the Information), contrary to MCL 750.520c(1)(a) involving the November 1996 incident where Defendant put his hands down Lucy and June's pants.[61]

Before sentencing, Defendant filed a Motion for New Trial claiming newly discovered evidence, i.e., eyewitnesses to the bicycle accident. The trial court conducted an evidentiary hearing on July 15, 1998, hearing testimony from Christopher and Daniel Merrow, as well as their mother, June Merrow, and Defendant's mother, Kathy Wolstone.[62] The trial court denied the motion, finding that the testimony of the children regarding the bicycle accident was available and could have been brought forth with very little effort.[63] The trial court immediately proceeded to sentencing and imposed a term of 15-40 years on Count 1, and 10-15 years on Counts 2 and 3.[64]

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[60]153a-154a.

[61]161a.

[62]Facts relevant to this issue are discussed in detail in the substantive portion of the Brief.

[63]189a-190a.

[64]191a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

The Court of Appeals affirmed the trial court on the issue of newly discovered evidence and agreed that the "evidence was readily discoverable and could have been produced with reasonable diligence."[65] Regarding Defendant's claim of ineffective assistance of counsel, the Court of Appeals remanded to the trial court for a hearing "limited to defendant's claims of failure to interview witnesses who might have provided testimony that directly exculpated defendant of the CSC I offense."[66]

On remand, the trial court conducted an evidentiary hearing and heard testimony from: Defendant's trial attorney David Goldstein, Defendant, Defendant's mother, Anthony Guido, Anthony Guido, Jr. (T.J.), Christopher Merrow, and Daniel Merrow.[67] At the conclusion of the hearing, the trial court found that any failure by trial counsel to interview witnesses did not constitute ineffective assistance, as the "eyewitness" testimony of T.J., Christopher, and Daniel would not have been a substantial benefit to the defense.[68] After a *de novo* review of the record, the Court of Appeals agreed.[69]

This Court directed the appointment of the State Appellate Defender's Office to file a supplemental Application for Leave To Appeal addressing two issues:[70]

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[65]350a.

[66]351a.

[67]Facts relevant to this issue are discussed in detail in the substantive portion of the Brief.

[68]344a-345a.

[69]354a.

[70]355a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

(1) whether defendant is entitled to a new trial based on newly discovered evidence consisting of eyewitness testimony concerning the bicycle accident, or in the alternative, (2) whether defendant was denied the effective assistance of trial counsel because counsel failed to interview and produce at trial eyewitnesses to the bicycle accident.

In an order dated October 30, 2002, this Court granted leave to appeal.[71]

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

[71] 356a.

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT DEFENDANT FAILED TO DEMONSTRATE THAT A NEW TRIAL WAS REQUIRED DUE TO NEWLY DISCOVERED EVIDENCE.

Standard of Review

The People concur in Defendant's statement of the standard of review.

Argument

To prevail upon a motion for new trial, a defendant bears the burden of showing each of the following four elements: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

The evidence alleged to be newly discovered is the claimed eyewitness testimony of Christopher and Daniel Merrow to a bicycle accident involving Lucy Guido. This case does not present any novel questions of law. It simply involves application of settled law to contested views of the facts. The People agree with Defendant that the first and second prongs of the newly discovered evidence standard have been met. Defendant has failed in his burden to establish the final two prongs.

New trial motions based on claims of newly discovered evidence are traditionally viewed with disfavor. *See, e.g., People v Pizzino*, 313 Mich 97, 109; 20 NW2d 824 (1945). The reasons for such a view are obvious. Parties should be encouraged to be diligent and

DAVID L. MORSE
Prosecuting Attorney
310 South Highlander Way
Howell, Michigan 48843

vigilant in presenting their case to a jury. Liberally favoring a new trial creates an incentive for a party to sit back and see how a trial unfolds. If the result is unfavorable, the loser then asks for a second bite at the apple with all the benefits of hindsight, along with the added advantage of requiring the winning side once again to marshal their evidence and present their case a second time. The circumstances of this case suggest that the guilty verdict led to a panicked search for "newly discovered evidence" in a desperate effort to secure a "do over." And as suggested by the People to the trial court, the risk of fabrication is especially high when coming up with "newly discovered evidence" leads to overturning the unfavorable jury verdict.[72]

1. The Newly Discovered Eyewitnesses Could Have Been Discovered And Produced With Reasonable Diligence.

The trial court, after hearing the testimony of the "newly discovered" witnesses, Christopher and Daniel Merrow, as well as the childrens' mother, June Merrow, and Defendant's mother, Kathy Wolstone, concluded that the testimony of the children regarding the bicycle accident was available and could have been brought forth with very little effort.[73] The Court of Appeals agreed that the "evidence was readily discoverable and could have been produced with reasonable diligence."[74]

The "newly discovered" testimony was then thirteen-year-old Christopher Merrow and

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[72] 114b.

[73] 189a.

[74] 350a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

his then eight-year-old brother Daniel[75] stating that they witnessed Lucy Guido injured in a bicycle accident. June Merrow, their mother and the sister of Defendant's girlfriend Amanda Cain,[76] was present at the residence and helped Amanda check on Lucy's physical condition.[77] At the time of the accident, all the kids were asking about Lucy.[78] Amanda, who testified and described the incident where Lucy had to be taken to the hospital because of an alleged bicycle accident,[79] knew that June was present as well.[80] June testified that she knew of the sexual allegations prior to the trial,[81] that the family knew where she was,[82] and even that she was present for part of the first day of trial when the two doctors testified.[83] Ms. Merrow, a medical assistant,[84] further testified that *she told Defendant's mother during the trial that her sons had witnessed a bike accident.*[85]

Defendant's mother Kathy Wolstone, who later acknowledged that she was deeply

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[75]176a-177a.

[76]84b.

[77]84b.

[78]163a.

[79]131a-132a.

[80]166a-168a.

[81]169a.

[82]170a.

[83]173a.

[84]175a.

[85]174a-175a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

involved in the defense,[86] testified that she was present for most of the trial.[87] Obviously cognizant of the significance that the identification of these eyewitnesses must be "newly discovered," Ms. Wolstone contradicted June Merrow and denied that she had ever talked to June Merrow or any of the potential witnesses until after the trial.[88] But perhaps even more suggestive of her post-conviction panic to try to undo the jury verdict convicting her son, Wolstone also testified that despite being present for the trial, despite being aware of the nature of the allegations and that one of the crimes was alleged to have occurred at the time of the alleged bicycle accident, only *after* the verdict did she "suddenly" become aware of an alibi that Defendant was not even present at the time.[89] But it was only *after* the trial did Ms. Wolstone undertake this search for any information she might have had.[90] The timing and nature of these belated allegations certainly lend credence to the People's claim that what is really happening here is that "newly discovered evidence" is crawling out of the woodwork because there is dissatisfaction with the verdict.

The trial court ruled:[91]

> I'm satisfied that the evidence that is now being proffered itself was available, just not brought forward, and I think could of [sic] been brought forward with very little effort with the conversations with his lawyer. ... And I'm satisfied

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[86] 133b.

[87] 103b.

[88] 108b-109b.

[89] 103b-108b, 141b-143b.

[90] 105b.

[91] 189a-190a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

> that the defendant using reasonable diligence could have discovered and produced the evidence that he now wishes to produce...

The Court of Appeals found no abuse of discretion in these findings:[92]

> However, even if we consider the Merrow brothers' testimony to be newly discovered and not cumulative, such evidence was readily discoverable by defendant and could have been produced at trial with reasonable diligence. The Merrows were not people unknown to defendant. They were members of his girlfriend's family who he was aware were present on the day the child was injured at her grandfather's home. Testimony offered by defense witnesses at trial and at the motion hearing established that defendant was present at the home the day the child suffered injury to her groin. We cannot conclude that the trial court's decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). No abuse of discretion is shown.

In his Application, Defendant simply alleges that the findings and conclusions of the trial court were an abuse of discretion and that the testimony is "inconclusive."[93] Yet this allegation demonstrates the propriety of the trial court's denial of the Motion for New Trial. If the testimony is, in fact, inconclusive or unclear, then Defendant has failed in his burden to establish that the evidence was "newly discovered" or that it could not have been discovered for trial through reasonable diligence. In his Brief, Defendant claims clear error by the trial court because June Merrow did not know that what she knew was important. Defendant relies on *People v Burton*, 74 Mich App 215; 253 NW2d 710 (1977) where the defendant's sisters had evidence that the defendant was not involved in the felony murder charged in that case. But reasonable diligence would not have uncovered the evidence in *Burton* because the newly discovered witnesses had an affirmative plan to conceal and withhold evidence. *Id*, at 224.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

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[92]350a.

[93]Defendant's Supplemental Application for Leave to Appeal at 18.

In this case, no such conspiracy existed. All Defendant or defense counsel had to do was ask Amanda Cain, Sam Cain, Jr., or June Merrow about who was present at the time and saw the bicycle accident.[94] Defendant himself could have easily offered the information to his lawyer.[95] Or Defendant's mother, who was so involved in the case, could have told her son's lawyer about what June Merrow told her after hearing the doctors testify. This was not the conspiracy of silence that existed in *Burton*. Nothing about the findings of the trial court or the Court of Appeals in this case should strike this Court as "wrong with the force of a five-week old, unrefrigerated dead fish." *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996)(defining clear error). Accordingly, the decisions of the trial court and the Court of Appeals should be affirmed.

2. Defendant Has Failed To Demonstrate That The Newly Discovered Evidence Would Probably Cause A Different Result Upon Retrial.

Defendant similarly glosses over the requirement that Defendant must show that the "evidence upon retrial *would probably* cause a different result" *Bradshaw*, *supra* (emphasis added). After hearing the trial and the testimony of the additional witnesses, and having an opportunity to judge their credibility, the trial judge stated that "...I'm not satisfied that even going a little bit further or much further with that evidence [regarding the alleged bicycle

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

[94]Defense counsel testified at the *Ginther* hearing that he knew before trial that June Merrow had knowledge of the alleged bicycle accident. 225a-228a, 235a, 267a.

[95]Although not explicit, both Sam Cain, Jr. and Amanda Cain's testimony suggests that Defendant was present at the time. 126a-127a; 82b-83b.

evidence] that it would of [sic] resulted in a different verdict."[96] Even during sentencing, the court commented that "...the under current [sic] [of all the circumstances of Defendant's motion] doesn't cause my stomach to churn to think that the verdict in this case was the wrong verdict."[97] Regarding this prong of the newly discovered evidence standard, Defendant flip flops the burden of proof and simply argues that "it cannot be said that this newly discovered evidence probably would not have resulted with a different verdict..." But the burden is on *Defendant* to show that the new evidence "*would probably cause* a different result." *Bradshaw, supra* (emphasis added). Defendant made no such showing to the trial court, the Court of Appeals, nor anything in this Court other than a conclusory allegation.[98]

While Defendant disagrees with the decision the trial court made, it cannot be said that the decision was "...so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). The Court of Appeals properly recognized that the trial court's denial of the motion for new trial was within its discretion.

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[96]190a.

[97]115b.

[98]The probability of a different result on retrial is also implicated by analysis of Defendant's ineffective assistance claim. As discussed below, had this "newly discovered" evidence been timely produced, the trial court and Court of Appeals recognized that the evidence was of such a weak nature that Defendant cannot show that the result of the trial would have been different.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

3. The "Newly Discovered Evidence" Did Not Affect Counts 2 And 3.

The newly discovered evidence directly affected Count 1 of the Information - it allegedly provided evidence of an alternate cause of the injury Lucy suffered. But as to Counts 2 and 3, the additional evidence would have had no value whatsoever as to June's testimony and, at best, only of impeachment value against Lucy.[99] It is well-established that "...newly discovered evidence is not grounds for a new trial where it would be used merely for impeachment purposes." *Bradshaw*, at 567 *quoting People v Stricklin*, 162 Mich App 623, 632; 413 NW2d 457 (1987). As to Counts 2 and 3, the existence of a bike accident is a collateral matter. Extrinsic evidence to impeach Lucy on this collateral matter would be precluded by MRE 608(b)[100] and a jury would so instructed. Accordingly, even if this Court were to conclude that the trial court erroneously denied Defendant's motion for a new trial, Defendant would be entitled to a new trial on only Count 1.

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[99]Even the value of the evidence as impeachment evidence is questionable. At no point in the testimony did Lucy ever deny being in a bike accident. Thus, it is certainly plausible she might have testified that at some point in time she *was* involved in a bike accident, just not an accident that caused the injuries for which she was treated by Dr. Bradfield.

[100]"Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

II. COUNSEL WAS NOT INEFFECTIVE FOR NOT INTERVIEWING WITNESSES WHOSE TESTIMONY WOULD NOT HAVE BEEN A SUBSTANTIAL BENEFIT TO DEFENDANT.

Standard of Review

The People concur that the effectiveness of counsel is subject to *de novo* review. However, factual findings are reviewed for clear error. MCR 2.613(C).

Argument

One of the most recent restatements of the standard of assessing a claim of ineffective assistance of counsel is in *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001)(internal citations omitted):

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.

Since review of this type of claim smacks of Monday-morning quarterbacking, "every effort must be made to eliminate the distorting effects of hindsight, and ... the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *People v LaVearn*, 448 Mich 207, 216; 538 NW2d 721 (1995)(internal quotes omitted) *quoting Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Review is also especially difficult because:

> As a Court far removed from the passion, dust, and grit of the courtroom, we must be especially careful not to second-guess or condemn with hindsight the decisions of defense counsel. A defense attorney must enjoy great discretion in the trying of a case--especially with regard to trial strategy and tactics. After all, the attorney witnessed or conducted voir dire, understood the credibility

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

> and demeanor of witnesses and his client, grappled with the evidence and testimony, and sensed the prosecutor's strategy. We only have the cold record.

People v Pickens, 446 Mich 298, 330; 521 NW2d 797 (1994)(internal quotes omitted). Similar to the claim of newly discovered evidence, this case does not present any novel questions of law. It simply involves application of settled law to contested views of the facts.

Defendant asserts two grounds for his ineffective assistance claim: (1) the failure to call Anthony Guido (T.J.) as a witness, and (2) the failure to interview witnesses who could have led to the discovery of two children who claimed to see a bicycle accident. A failure to present evidence can constitute ineffective assistance only if the failure deprived the defendant of a substantial defense, i.e., one that would have resulted in the acquittal of the defendant. *People v Bass*, 223 Mich App 241, 252; 565 NW2d 897 (1997).

Defendant's trial counsel was David Goldstein, a well known criminal defense lawyer in practice since 1969.[101] Criminal cases make up approximately 60% of his caseload, and he has handled thousands of criminal cases, involving hundreds of felony trials, including at least five to six trials of life felonies every year.[102] The trial court volunteered familiarity with Mr. Goldstein's excellence as a criminal defense attorney.[103]

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[101] 192a.

[102] 266a-267a.

[103] 189a, 344a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

1. Defense Counsel Exercised His Professional Judgment And Made A Tactical Decision That The Existence Of A Bicycle Accident Was Not A Significant Issue.

Very early in the case, Defendant gave his attorney the names of a number of witnesses who might have "some information" regarding whether or not he was around at the time of the incidents charged, i.e., an alibi.[104] At the time the list of names was given to the attorney, there was no particular relevance of the alleged bike accident.[105] Had counsel interviewed one of these witnesses, June Merrow, it is alleged that he might have discovered the names of Christopher and Daniel Merrow.[106] Counsels' alleged failure to then interview these people is the source of Defendant's claim.

Despite the apparent lack of specificity regarding who these witnesses were and what relevant testimony they might offer, defense counsel was aware of June Merrow and her knowledge of the victim's bleeding before trial.[107] It was the exercise of counsel's professional judgment to determine what issues were relevant to the defense and what were not. In this case, counsel recounted repeatedly that the *existence* of the accident was not the significant issue, but rather, what had *caused* the vaginal injury.[108] Given the admission by Lucy to the doctor that there was a bicycle accident, as well as the existence of adults who could confirm seeing blood, counsel concluded that the accident was not going to be contested.

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[104]123b-124b.

[105]128b.

[106]Even Defendant's own testimony is that interviewing June Merrow *might* have revealed the involvement of her children as potential witnesses. 131b.

[107]205a, 225a-228a, 235a, 267a.

[108]216a, 218a, 230a, 240a, 242a-244a, 270a, 274a.

DAVID L. MORSE
Prosecuting Attorney
210 South Highlander Way
Howell, Michigan 48843

Only when the prosecutor stated in her opening statement that the accident did not occur did the existence of the accident become an issue.[109] It is the essence of professional judgment to try to predict what approach a prosecutor might take in presenting a case. And it is axiomatic that the exercise of judgment carries the risk of being wrong. But in this case, even though counsel judged incorrectly about how the prosecutor would approach the victim's description of a bicycle accident to the doctor, he was able to turn that changed approach to his advantage. As counsel stated, "...since our position was that the girl was a liar, I welcomed [the prosecutor] getting up and saying that the girl lied."[110] Thus counsel considered, and rejected, a strategy that would have required getting into the bicycle accident based on his judgment that adequate proof that the accident occurred already existed. He further determined that because lay witnesses would be unable to connect the accident to the *nature* of the injury sustained by the victim, presenting them detracted from the defense that the girl was a liar.[111] The issue was what caused the bleeding, not the accident.[112]

Defense counsel acknowledged that he did not interview June Merrow prior to trial.[113] But as counsel indicated, he understood the nature of the testimony she would be able to offer: that she was one of the two adult women who saw the victim bleeding.[114] At the time of trial,

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[109]246a.

[110]246a, 275a.

[111]240a, 276a.

[112]281a.

[113]227a. The other witness was Amanda Cain, who testified at trial.

[114]267a.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

counsel had never heard of Christopher or Daniel Merrow.[115] But he further testified that had he known about them, he would not have interviewed them because "I didn't think proving the existence of the accident was going to be an issue."[116] Again, counsel exercised judgment to assess what the issues would be at trial. A defense attorney is not required to investigate *every* possibility and anticipate *every* possible permutation about how the proofs in a case *might* come out. And counsel is even permitted to be wrong in his judgment. As this Court observed in *Pickens*:

> Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial. Most criminal defense attorneys have a variety of options from which to choose that affect, if not determine, how the jury understands and comprehends the case. Many of these options in a particular case may be contradictory, confusing, incredible, or simply poor. The role of defense counsel is to choose the best defense for the defendant under the circumstances. *Strickland* permits the defense attorney to do so because, unless the attorney abandons a defense that had a reasonable probability of affecting the jury verdict, the attorney may choose the best defense. Defense counsel must be afforded "broad discretion" in the handling of cases, which often results in "taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat."

446 Mich at 324-325. Counsel's strategic decision at the time not to focus on the bicycle accident, although problematic with the benefit of hindsight, does not constitute ineffective assistance.

DAVID L. MORSE
Prosecuting Attorney
:10 South Highlander Way
Howell, Michigan 48843

[115] 267a.

[116] 268a-269a.

2. "Failure" To Call T.J. As A Witness Deprived Defendant Of Nothing.

Defendant claims that counsel should have interviewed and called Lucy's brother as a witness. During the *Ginther* hearing, the trial court heard the testimony of T.J. regarding an alleged bicycle accident. T.J. testified that he never saw his sister Lucy ride a bike, except with training wheels, does not remember there being any bike accident or talking with anyone else about seeing a bike accident.[117] Although fifteen years old at the time he testified, T.J. was emotionally or mentally impaired to the extent that he is unable to remember things, including events which have just occurred.[118] It is the failure to introduce this testimony which is claimed to be constitutionally ineffective.[119] Defendant acknowledges T.J.'s disability and simply *speculates* that had Defendant's trial counsel called him as a witness in the trial, which was held almost two years after the claimed bicycle accident, T.J. *may* have been able to remember. The trial court's observation is accurate: "T.J.'s testimony, in my opinion, would have been of no value, now or then."[120] Furthermore, Defendant's claim that, at the very least, hearsay statements by T.J. to various people could have been admitted pursuant to MRE 801(1) and (2) ignores the fact that hearsay statements by T.J. *were* introduced and admitted

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[117]298a-310a.

[118]312a-314a.

[119]Mr. Goldstein testified that his investigators attempted to interview T.J., by going through his father, but that the father was not cooperative. 287a. Given the brother/sister relationship, it is certainly reasonable to presume that additional cooperation in the form of favorable testimony from T.J. would not be forthcoming.

[120]345a.

DAVID L. MORSE
Prosecuting Attorney
110 South Highlander Way
Howell, Michigan 48843

at trial.[121] And defense counsel even argued the hearsay statements from T.J. in his closing.[122]

Defendant was deprived of nothing given T.J.'s inability to remember anything. Defendant now *guesses* that his testimony *might* have been helpful, however it is just as likely that it might not have. In fact, the trial court made the specific factual finding that T.J.'s testimony would *not* have been helpful to the defense and Defendant cannot show how that factual finding is clearly erroneous. Furthermore, it would be pointless to order a new trial to present the testimony of a witness who knows nothing. Thus, Defendant has failed to show how this non-testimony would have led to an acquittal. The non-introduction of pointless testimony cannot be ineffective assistance. Defendant has failed in his burden to demonstrate a *reasonable probability* that the result of the trial would have been different had T.J. testified.

3. Defense Counsel Was Not Ineffective For Not Interviewing Witnesses About An Event Counsel Determined To Be Of Minimal Relevance And That The Trial Court Found Not To Be Of Substantial Benefit To The Defense.

Assuming that these witnesses would have been discovered, Defendant claims "clear error" in the trial court's finding that the testimony of Christopher and Daniel Merrow would not have been a substantial benefit to the defense. The Court of Appeals agreed with the trial court. This finding was essentially one of credibility, based on the trial court's view of the manner and demeanor of the witnesses, including the dramatic inconsistencies in their

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

[121]Testimony of Sam Cain, Sr. at 125a; Sam Cain, Jr. at 127a; and Amanda Cain at 132a.

[122]147a.

testimony.[123]

At the *Ginther* hearing, Christopher testified that he could not remember the bike accident, but that his testimony at the earlier court hearing was accurate.[124] He was able to relate some details about the bike: it was green and broken in half in that the handlebars were separated from the rest of the bike.[125] When questioned further, Christopher was able to relate that Lucy was running down the hill holding the handlebars of the bike with a wheel attached to the fork.[126] He stated that *no one was actually riding the bike.*[127] As Christopher described it, a bunch of kids were taking turns running down a hill holding a set of handlebars.[128] At the bottom of the hill was a metal pile.[129] In his prior testimony, Christopher described the circumstances similarly: Lucy ran down the hill with handlebars.[130] But while Christopher was describing an incident that occurred in the summertime,[131] the sexual assault which led to Lucy's medical treatment occurred around October 22, 1995.[132]

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[123]346a-347a.

[124]315a-316, 321a.

[125]315a-317a.

[126]319a-320a, 144b.

[127]320a.

[128]322a-324a.

[129]325a.

[130]178a.

[131]177a.

[132]21a.

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Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

Daniel, however, told a much different story. He agreed that Christopher was there,[133] but contrary to Christopher's testimony, Daniel described a bike with pedals, a seat, and three wheels.[134] In further describing the scene, Daniel explicitly denied Christopher's assertion that there was a pile of metal at the base of the hill.[135] Daniel further specifically contradicted Christopher's testimony that the bicycle had only one wheel and that the kids were running down the hill with the handle bars and wheel in front of them.[136] Daniel even called it "a little tricycle."[137] He said the bike was his, and that the day after the accident, *Defendant took the bike, put it in his car, and said he would fix it for him.*[138] Thus, Defendant was personally aware of the evidence he now claims was left undiscovered because of his attorney's supposed incompetence.

But even if counsel *had* interviewed the Merrow brothers and *had* changed his mind to call them as witnesses, the trial court found, after hearing their testimony and viewing their demeanor, that the choice not to do so did not deprive Defendant of evidence that would have been a "substantial benefit." As the trial court noted, the testimony of Christopher would have been of no benefit at all, given that his description of the bicycle was not a bicycle at all, but "a unicycle without a seat on it" and his further testimony that *he didn't even recall seeing the*

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[133]335a.

[134]334a, 338a.

[135]160b.

[136]161b.

[137]338a.

[138]336a-337a, 163b-164b.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

claimed accident.[139] In addition, his testimony was directly contradicted by his brother Daniel, who gave a completely different description of the bicycle and the surrounding circumstances. As found by the trial court, the testimony was of such a nature that it called into question whether or not there was even a bicycle, much less an accident.[140] It is this testimony that Defendant would seek to present at a retrial in this matter. The trial court's conclusion that this testimony did not provide a "substantial" benefit to Defendant is not clearly erroneous.[141] Furthermore, given that Defendant appeared to know about the bike accident, counsel's failure to *interview* witnesses did not cause the non-discovery of these witnesses, but rather it was *Defendant's silence* and *his* failure to tell his own lawyer about what he knew.

This is not a case where defense counsel could articulate no reason for not calling any of six eyewitnesses to a shooting who swore that Defendant did not do it. *See People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996). Rather, it is an attempt to introduce collateral evidence to impeach the victim's credibility and show an *alternate* source for an injury that still would not exclude Defendant's criminality as the explanation. This was not directly exculpatory information. Had this contradictory and vague testimony been presented to the jury, Defendant cannot demonstrate the reasonable *probability* that he would have been acquitted.

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[139] 345a.

[140] 346a.

[141] Again, nothing about this finding by the trial court satisfies the *Cheatham* "unrefrigerated dead fish" standard for clear error.

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843

4. The Claimed Ineffective Assistance Of Counsel Did Not Taint The Convictions On Counts 2 And 3.

Finally, assuming *arguendo* that Defendant has shown ineffective assistance, Defendant for the first time on appeal in its brief to this Court suggests that the convictions on Counts 2 and 3 should be reversed as well because "Lucy's and June's credibility was intertwined at trial."[142] But to the extent Lucy could have been "impeached" with evidence of an alternate source of the injury she suffered, this impeachment evidence was collateral as to Counts 2 and 3 and thus precluded by MRE 608(b). As the Court of Appeals noted in its remand order to the trial court for a *Ginther* hearing, the remand was limited to "testimony that directly exculpated defendant of the CSC 1 offense."[143] The testimony of Christopher and Daniel would no relevance beyond providing evidence of an alternate source of the injury which formed the basis for the conviction on Count 1. The conviction for First Degree Criminal Sexual Conduct is the only conviction subject to any allegation of substantive error in this appeal. At the very least, Defendant's convictions and sentences on Count 2, which involved a different time and place, and Count 3, which involved a different time, place, and victim, should be affirmed. MCL 769.26.[144]

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[142]Defendant's Brief at 40.

[143]351a.

[144]"No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

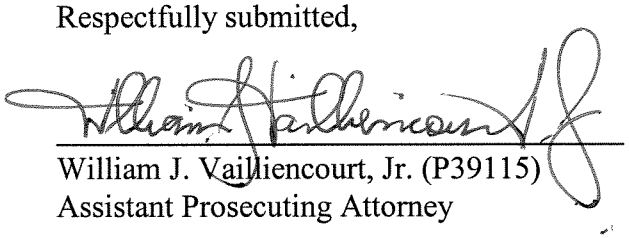
DAVID L. MORSE
Prosecuting Attorney
210 South Highlander Way
Howell, Michigan 48843

RELIEF REQUESTED

Regarding the allegations which involve Defendant's single conviction for Criminal Sexual Conduct - First Degree, the decisions of the trial court and the Court of Appeals should be affirmed. To the extent this Court may find that Defendant is entitled to any relief, that relief should be limited to remand for a retrial on Count 1 only.

FOR THE FOREGOING REASONS, the People request that the Court AFFIRM Defendant's convictions.

Respectfully submitted,



William J. Vailliencourt, Jr. (P39115)
Assistant Prosecuting Attorney

Dated: March 18, 2003

DAVID L. MORSE
Prosecuting Attorney
10 South Highlander Way
Howell, Michigan 48843